

APPEAL NO. 000650

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 15, 2000. In response to the issue at the CCH, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third and fourth quarters. Claimant appeals on sufficiency grounds, contending that she had no ability to work during the filing periods in question. The respondent (carrier) responds, urging affirmance. The direct result determinations in claimant=s favor were not appealed.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBs for the third and fourth quarters. Claimant asserted that: (1) the medical evidence established that she had no ability to work during the filing periods in question; (2) claimant=s treating doctor intended that she finish her chronic pain program before returning to work; and (3) the medical evidence relied on by carrier was too remote to be relevant. Claimant testified at the CCH that she could not work during the filing periods in question because of pain, doctor=s appointments, the scheduling of surgery, and medical appointments regarding unrelated health conditions. Claimant said her doctors are considering additional surgery to her neck. Claimant=s medical records indicate that she underwent cervical and shoulder surgery in 1997 and 1998.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant had an impairment rating (IR) over 15%; and (3) claimant did not commute any of her impairment income benefits. The filing periods for the third and fourth quarters ran from approximately mid-May 1999 to November 26, 1999. There was medical evidence that claimant underwent laparoscopic surgery for gastroesophogal reflux disease, related to her injury, after the end of the filing periods in question.

The hearing officer determined that: (1) claimant had some ability to work during each of the filing periods in question; (2) claimant did not provide a narrative report that explained how the injury caused a complete inability to work; and (3) other records show that claimant was able to return to work during the filing periods in question. The hearing officer did not make an express determination regarding the good faith requirement. However, it is clear from the decision and order that he determined that claimant did not, in good faith, seek employment commensurate with her ability to work. The hearing officer stated that, although claimant=s doctors noted her chronic pain and limitations on the use of her right upper extremity, he did not consider the medical evidence to be a sufficient narrative explaining why she had a total inability to work.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the filing period is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. The Appeals Panel's standard of review in this case is also set forth in Appeal No. 000004.

Claimant bases her entitlement to SIBs for the third and fourth quarters on the basis of no ability to work. The version of Tex. W.C. Commission, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) then in effect provided that an employee may be in good faith if the employee:

has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

Claimant had the burden to prove that she had no ability to work. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. The hearing officer was the sole judge of the credibility of the evidence and he judged the credibility of the medical evidence regarding whether claimant had an ability to work during the filing period. The hearing officer specifically found that claimant had some ability to work. There was evidence from claimant's treating doctor indicating that claimant could not work because of her right upper extremity and shoulder-related problems. Claimant's treating doctor wrote that he would evaluate claimant regarding work ability after she completed a chronic pain management program. Medical records indicate that claimant attended this program from July 1999 to August 20, 1999. In March 1999, claimant's treating doctor stated that her functional capacity evaluation indicated that she could do sedentary work, but that he wanted her to complete a physical rehabilitation program before he released her to light duty. However, the hearing officer was the sole judge of the credibility of this evidence. The hearing officer could consider the records from Dr. S and Dr. T to be records showing that claimant was able to work, despite the fact that they were written in March 1998 and August 1998. The hearing officer made his determinations regarding claimant's ability to work based on the evidence before him. Because the hearing officer's determinations in this regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for his. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge